

(Why) Should Children Have Rights?

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(Why) Should Children Have Rights? A Philosophical Perspective

Mariek Hopman

1 Introduction

The UN Convention on the Rights of the Child (CRC) expresses an apparently universal idea regarding children's rights.¹ The idea is that the child 'for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding' and be 'brought up in the spirit of peace, dignity, tolerance, freedom, equality and solidarity', given that the child 'by nature of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth', which is the case ultimately because 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.²

So, quite a few assumptions are made in the preamble to the CRC, assumptions that I wish to question. This chapter discusses, first, the idea of universal childhood, analysing the meaning of the concept of childhood as understood by Immanuel Kant and Jean-Jacques Rousseau – the child as pre-moral and pre-social, respectively. Secondly, I ask whether children can be said to have any rights at all. Obviously they do, in the sense that there is a legal instrument stating children's rights, but if we examine the meaning of 'having a right' in the light of Kant's ideas, this is certainly questionable. It might be more a matter of adults granting children legal privileges. Thirdly, I consider why we, as adults and authors of the law, should grant children rights, or legal privileges. The chapter concludes with a reflective discussion.

2 The child

In philosophy, much attention has been given historically to the central question of philosophical anthropology, namely, 'What constitutes a human being?' However, it seems that the answers to this question are in fact answers to the question, 'What constitutes the adult human being?', or even, 'What constitutes the adult, male human being?' In discussing this question, an important group of human beings is left out, which currently consists of more than 25 per cent of the world's population. This is precisely the group I will focus on: children.³ Studies in philosophy, when discussing children, focus on education – on how to raise the child to become the full human being that was formulated as an answer to the first question. The

¹ The CRC is ratified by 196 members of the UN, only excluding the USA and Somalia. Both countries have expressed the intention to ratify the convention in the future. See: Amnesty International 'Convention on the Rights of the Child: Frequently Asked Questions', available at <http://www.amnestyusa.org/our-work/issues/children-s-rights/convention-on-the-rights-of-the-child-0> (accessed 3 January 2015), AllAfrica 'Somalia to Ratify UN Child Rights Treaty', available at <http://allafrica.com/stories/201311210066.html> (accessed 3 January 2015).

² Convention on the Rights of the Child, 1989 United Nations General Assembly resolution 44/25 (1989) preamble.

³ In 2013, 26 per cent of the world's population was younger than 15 years old. See Population Reference Bureau '2013 world population data sheet', available at http://www.prb.org/pdf13/2013-population-data-sheet_eng.pdf (accessed 3 January 2015).

question ‘What constitutes a child?’ has been neglected by philosophers more concerned about providing an account of the (adult) human being they expect or wish everyone to be or become.⁴

The uncertainty about the meaning of the concept of childhood is reflected in international law. In the CRC, for example, a child is distinguished from an adult by its age; the Convention concerns every human being below the age of 18 years, ‘unless under the law applicable to the child, majority is attained earlier’ (article 1). The implication is even though the characteristics (in terms of features and needs) of childhood are universal, its duration is not. This is confirmed by research in anthropology. LeVine and New observe that ‘every human society studied recognizes a distinction between children and adults and the age-linked emergence of children’s abilities to learn, work, and participate in community activities as they grow and develop’; however, child-rearing practices vary greatly among different cultures, as does the age-linked picture of the ‘normal child’.⁵

Philosophers are often concerned with questions of essence, of universal definition. To answer the question of who (should) possess the rights listed in the CRC, it is therefore interesting to consider what, according to philosophers, is the essence of childhood. The next section does so by focusing on Kant and Rousseau’s portrayal of the child as not-yet-adult.

2.1 Kant: the child as pre-moral

To look for a meaning of childhood that can be related to the idea of children’s rights, I first examine Kant’s concept of the adult as a moral actor, a free subject in possession of practical reason by which he or she can align his or her will with the categorical imperative.

According to Kant, the human will is part of the faculty of desire, which is determined by the subject’s inner reason – it has no other determining ground, it is practical reason itself.⁶ Human beings possess a capacity for free choice. This is what makes them different from animals: the animal’s choice is determined by inclination only, while the human’s can be affected, but not determined by, impulses. Choice is therefore not of itself pure but can be expressed as actions by pure will.⁷ It is reason that has to transcend the animalistic inclinations that are present in every human being, by commanding ‘how we are to act even though no example of this [can] be found’.⁸

The moral law is laid down as a principle of the deduction of freedom as a causality of pure reason, and its existence proves the existence of freedom.⁹ Moral laws hold as laws only insofar

⁴ This approach is not exclusive to philosophy; similar observations have been made in relation to developmental research, which is used to inform the basic picture of childhood for other academic disciplines. See, for example, Mayall, who argues that developmental psychology is ‘the discipline which has achieved dominance, as providing authoritative and factual knowledge for [child] professionals about children’ (Mayall B ‘The sociology of childhood in relation to children’s rights’ (2001) 8 *The International Journal of Children’s Rights* 244).

⁵ LeVine RA & New RS *Anthropology and Child Development: A Cross-Cultural Reader* 3, 5.

⁶ Kant I *Metaphysics of Morals* in Gregor MJ (ed) *Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant* (1996) 6: 213 (hereafter *Metaphysics of Morals*).

⁷ Kant I *Metaphysics of Morals* 6: 213-14.

⁸ Kant I *Metaphysics of Morals* 6: 216.

⁹ Kant I *Critique of Practical Reason* in Gregor MJ (ed) *Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant* (1996) 5: 48 (hereafter *Critique of Practical Reason*).

as they can be seen to have an a priori basis and to be necessary.¹⁰ So, moral laws need an a priori basis, and without it there is no freedom (because its existence proves the existence of freedom, and the moral law is a principle of the deduction of freedom as a causality of pure reason – without it, there would be no free will and human beings would be animals acting on inclinations only). Freedom and the moral law are mutually dependent.

Thus, now we have to look for the a priori moral law and a priori freedom. According to Kant, freedom is innate to human beings; a child is born endowed with freedom.¹¹ Also, human beings are born with moral feeling ('the susceptibility to feel pleasure or displeasure merely from being aware that our actions are consistent with or contrary to the law of duty') and a conscience.¹² However, virtue ('moral strength of a human being's will in fulfilling his duty') is not innate but must be taught.¹³ It is based on inner freedom, and it contains 'a positive command to a human being, namely to bring all his capacities and inclinations under his (reason's) control and so to rule over himself'.¹⁴ It follows that the will is not pure of itself but that this purity must be developed in human beings. This accords with the idea of children as those becoming human beings, becoming adults, becoming moral actors. Adding to this line of thought, Kant writes that we become conscious of the moral law as soon as we draw up maxims of the will for ourselves.¹⁵ Here, there is some room for a developing child to engage in the process of learning to draw up maxims of the will for him- or herself.

However, Kant also states quite a few things to the contrary. For example, he asserts that 'the most common understanding can distinguish without instruction what form in a maxim makes it fit for a giving of universal law and what does not'.¹⁶ Therefore, every understanding (or human consciousness) should be able to apply the categorical imperative without need of instruction, even the child. Or, then again, perhaps the child's understanding is not a common understanding, and/or there is no (or only a vague intimation of a) maxim in the child's mind. Kant also states that

the positive concept of freedom is that of the ability of pure reason to be of itself practical. But this is not possible except by the subjection of the maxim of every action to the condition of its qualifying as a universal law.¹⁷

If the child's mind is not yet able to draw up maxims of the will for itself, it cannot subject the maxim of every action to the condition of its qualifying as a universal law. Does this mean that the child is not free? It makes sense to say that the child (or specifically its mind, or reason, or will) is unfree, since there is no room for free will to determine by means of maxims the action of the subject and in this act to overrule inclinations. This is what Kant says too, in a way: '[F]reedom, the causality of which is determinable only through the [moral] law, consists just

¹⁰ Kant I *Metaphysics of Morals* 6: 215.

¹¹ Kant I *Metaphysics of Morals* 6: 237-280.

¹² Kant I *Metaphysics of Morals* 6: 399-400.

¹³ Kant I *Metaphysics of Morals* 6: 405-477.

¹⁴ Kant I *Metaphysics of Morals* 6: 408.

¹⁵ Kant I *Critique of Practical Reason* 5: 29-30.

¹⁶ Kant I *Critique of Practical Reason* 5: 27.

¹⁷ Kant I *Metaphysics of Morals* 6: 213-14.

in this: that it restricts all inclinations, and consequently the esteem of the person himself, to the condition of compliance with its pure law'.¹⁸ But then, first, how would the unfree child (much like an animal) ever develop into a free moral actor – how would this transition be able to take place? And, secondly, this contradicts Kant's statement that a person possesses innate freedom from birth.

When analysing Kant's work, it seems that we can think of the child's innate freedom as a potentiality in every human being, a potentiality to be actualised by practising and developing virtue. Kant suggests that virtue should be taught by way of catechistic moral instruction combined with Socratic dialogue: 'the advantage of this is [...] that it is a cultivation of reason most suited to the capacity of the undeveloped, and so it is the most appropriate way of sharpening the understanding of young people in general'.¹⁹ So, as is apparent from the quote, Kant indeed recognises that there is room for developing the child's practical reason.

One of the difficulties of this view is that it is unclear whether human beings ever fully realise their freedom. Are they not always developing virtue and thus ever imperfect? If so, then what is the difference between the child and adult? Kant puts the end of childhood at the point when a person is able to support himself.²⁰ This hardly seems a moral requirement – unless being able to support yourself is taken in a broad sense to mean being able to be in the world as a moral agent. Kant argues that every human being is obligated to cultivate moral feeling and virtue.²¹ So, the human being is always becoming, realising his freedom to a greater degree and making his will ever more pure. However, within the Kantian paradigm, childhood can be understood perhaps as a pre-responsible period, one in which reason can make itself acquainted with the moral law gradually, a period for developing virtue, for practising making value judgments based on the categorical imperative yet being allowed to make mistakes.²² When the person leaves the period of childhood, he can be supposed to have finished this process and thus can be held accountable for his actions as an autonomous, rational being in possession of free will.²³

2.2 Rousseau: the child as pre-social

Although famous for having written one of the foundational works of modern-day childhood studies, Rousseau did not directly answer the question about the essence of childhood either; he, too, focuses on how to educate the child in becoming an adult. But when we combine his work *Emile, or On Education* (1761) with his *Discourse on Inequality* (1754), an image emerges of the child comparable to natural man as described in the *Discourse*, with the distinction that the child, contrary to the natural man in a state of nature, finds himself from birth in civil society, where he encounters institutional law. The child therefore needs education to become a good citizen. Following Rousseau's conception of the child as natural man, we

¹⁸ Kant I *Critique of Practical Reason* 5: 78.

¹⁹ Kant I *Metaphysics of Morals* 6: 483-84.

²⁰ Kant I *Metaphysics of Morals* 6: 282.

²¹ Kant I *Metaphysics of Morals* 6: 399-400 408.

²² See Schapiro T 'What is a child?' (1999) 109 *Ethics* 732-3. According to Schapiro, children can engage in 'play', whereby they "try on" selves to be and worlds to be in'.

²³ See also Schapiro T 'What is a child?' (1999) 109 *Ethics* 728-31.

find an image of the child as a pre-social, a-legal yet growing and developing creature. I will elaborate on this below with reference to Rousseau's two works mentioned above.

In *Emile*, Rousseau, in the process of instructing the teacher, divides childhood into four phases. In each phase before adulthood there is a different educational need. At first sight it seems that for Rousseau the main distinguishing characteristic between the child and adult is reason, given that he refers often to the child as one who has not yet reached 'the age of reason'.²⁴ The problem we encountered with regard to the transformation of the child's mind is solved by Rousseau's saying that 'childhood is the sleep of reason'.²⁵ However, it is clear when reading *Emile* that Rousseau is inconsistent in attributing reason to children. He admits to this in a footnote:

Sometimes I say children are incapable of reasoning. Sometimes I say they reason cleverly. I must admit that my words are often contradictory but I do not think there is any contradiction in my ideas.²⁶

More importantly, the child is non-social and therefore natural and good. In this sense the child and the natural man (savage) in the state of nature are alike. In his *Discourse on Inequality*, Rousseau describes the savage who lives in a state of nature. Existing in an unsocial condition (because he lives alone), he has no knowledge of good and evil,²⁷ lacks reason in general,²⁸ and his desires do not exceed the desire for self-preservation.²⁹ Civilised man, on the other hand, finds himself in society, where his desires exceed his power to acquire the things he desires and so lead to unhappiness.³⁰

In the savage we find an embodiment of the pure soul. The child, in its turn, is a pure soul born in the unnatural condition of civil society. Because of this condition, the child needs education. There is no escaping this condition of society, because men left the state of nature and have thereby compelled others to do the same.³¹ The child cannot stay pure and natural, since 'under existing conditions a man left to himself from birth would be more of a monster than the rest'.³² Rousseau writes that

Émile is no savage to be banished to the desert, he is a savage who has to live in the town. He must know how to get his living in a town, how to use its inhabitants, and how to live among them, if not of them.³³

So, the entire goal of *Emile* as a teacher's guide is to enable the human being to become as pure a soul as possible in civil society, even at adult age, to 'raise him above prejudice and to base

²⁴ For example, Rousseau JJ *Emile* 21.

²⁵ Rousseau JJ *Emile* 80.

²⁶ Rousseau JJ *Emile* 81.

²⁷ Rousseau JJ *Discourse on Inequality* 128-30.

²⁸ Rousseau JJ *Discourse on Inequality* 137.

²⁹ Rousseau JJ *Discourse on Inequality* in Masters R (ed) *The First and Second Discourses by Jean-Jacques Rousseau* (1964) 137,138 (hereafter *Discourse on Inequality*).

³⁰ Rousseau JJ *Discourse on Inequality* 146 156, Rousseau JJ *Emile* 56.

³¹ Rousseau JJ *Emile* 168.

³² Rousseau JJ *Emile* 13.

³³ Rousseau JJ *Emile* 179.

his judgments on the true relations of things', so that 'one day the child may judge rightly of good and evil in human society'.³⁴ The surest way to do this, according to Rousseau, is 'to put him in the place of a solitary man, and to judge all things as they would be judged by such a man in relation to their own utility'.³⁵

Apart from the conditions they find themselves in, there are further differences between the child and the savage.³⁶ The freedom of the child is different from the freedom of the savage. First, the child is weaker than the (adult)³⁷ savage; therefore the child is not self-sufficient, and this compromises his liberty whether in a state of nature or in society. The child's liberty is an 'imperfect liberty, like that enjoyed by men in social life',³⁸ while the savage is completely free.³⁹ Secondly, the savage has no curiosity, whereas the child does.⁴⁰ The savage, on the other hand, possesses a natural and innate capacity for pity, which according to Rousseau precedes reason⁴¹ and is a capacity the child develops only in the fourth phase of childhood. Although both the child and the savage are naturally good,⁴² this 'goodness' seems to derive from their lack of ethical awareness. Neither of them has ethical knowledge and hence they are innocent – there is no morality in their actions.⁴³ This lack of ethical knowledge and of morality in action makes the child in society unfit for the moral order of society.⁴⁴ Until the age of 16, the child is unable to understand the law, because 'the love of others is the source of human justice' and the child does not yet feel this love.⁴⁵ Consequently, the child is not subject to duty.⁴⁶

It is during the third phase of childhood, when the child starts to develop reason, that the savage and the child seem to part ways. For the savage there is no education and no improvement, so according to Rousseau 'the species [grows] old, while the individual still remain[s] in a state of childhood'.⁴⁷ During the fourth phase of childhood, then, the child gains ethical knowledge and understanding as a precondition for living in civil society. The last phase of childhood is a time of erring, the time when the child practices and learns how to live in social reality, the time when he learns the law, that is, the law of human civil society.⁴⁸ He becomes a full citizen only then as an adult.

³⁴ Rousseau JJ *Emile* 165.

³⁵ Rousseau JJ *Emile* 159.

³⁶ Here it has to be remarked that obviously 'child' and 'savage' are not mutually exclusive concepts. Some comments have been added on the savage being an adult – I hope to distinguish these terms clearly.

³⁷ The savage as described by Rousseau in the *Discourse* is assumed to be an adult: first, because the description does not seem to match children's capacities, and, secondly, because in *Emile* Rousseau remarks that '[e]ven in a state of nature children only enjoy an imperfect liberty' (57).

³⁸ Rousseau JJ *Emile* 57.

³⁹ Rousseau JJ *Discourse on Inequality* 164-5.

⁴⁰ Rousseau JJ *Emile* 179.

⁴¹ Rousseau JJ *Discourse on Inequality* 91 130.

⁴² Rousseau JJ *Discourse on Inequality* 193, Rousseau JJ *Emile* 11 195.

⁴³ Rousseau JJ *Discourse on Inequality* 128, Rousseau JJ *Emile* 40-1 191 195.

⁴⁴ Rousseau JJ *Emile* 152.

⁴⁵ Rousseau JJ *Emile* 210.

⁴⁶ Rousseau JJ *Emile* 312.

⁴⁷ Rousseau JJ *Discourse on Inequality* 137.

⁴⁸ Rousseau JJ *Emile* 223-4.

3 Children's rights?

Both the Kantian and Rousseauian analyses of the essence of childhood lead to questions as to whether children can be considered as rights-bearers. Under both analyses it is hard to see how a pre-moral, pre-social child can bear such a thing as a universal right, as it cannot yet rule itself and does not understand laws at the level of society. According to the CRC, there is a twofold reason for international children's rights as laws: first, because the child, a mentally and physically immature being, needs special safeguards and care, and, secondly, because this contributes to freedom, justice and peace in the world. The idea is ratified by all UN countries.⁴⁹ If we are to conclude, for the time being, that there is a universal understanding of the concept of childhood, then the question is: What is it about children that makes them eligible for special rights, ones different from adult's rights? There must be something inherent in the essence of the (universal) child that entitles them to special rights. What is it?

First, we have to understand that the idea of children's rights starts with an exclusion. Since the 1948 Universal Declaration of Human Rights, there have been rights for all human beings. But these rights are not all applicable to children. If we look at article 1 of the Declaration, it states: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'.

The second article states that everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind. But, of course, there is a distinction with regard to certain of these rights and freedoms, one based (legally) on age. For example, article 16 states that

[m]en and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

So, the child, who is not 'of full age', does not have this right and is therefore not 'free and equal in rights' relative to the adult. The same may be the case, depending on national law, for the right to own property (art. 17), the right to take part in the government of his country (art. 21.1) and the right to work (art. 23). On the other hand, article 7 states that '[a]ll are equal before the law and are entitled without any discrimination to equal protection for the law' – in fact, in most countries children are protected more extensively by the law than adults and hence adults and children are not equal before the law in this respect either.

Secondly, we have to understand what we mean by 'a right'. According to Kant, a right (1) has to do with the external and practical relation of one person to another; (2) signifies a relation to the other's choice; and (3) is a reciprocal relation of choice, of which only the form of choice is in question, which is regarded as free – the question is whether the action of one can be united with the freedom of the other in accordance with a universal law. As he declares, 'Right is therefore the sum of the conditions under which the choice of one can be united with the

⁴⁹ The UN comprises basically all the countries in the world, except for 11 states whose sovereignty is disputed by other states.

choice of another in accordance with a universal law of freedom.’⁵⁰ Regarding children’s rights, Kant observes that children have an innate right to care by their parents until they are able to look after themselves. This parental obligation follows from the act of procreation by which parents have brought a person in the world without its consent.⁵¹ Therefore parents need to

make the child content with his condition so far as they can. They cannot destroy their child as if he were something they had made (since a being endowed with freedom cannot be a product of this kind) or as if he were their property [...]⁵²

This again seems contradictory: how can the parents have a reciprocal relation of choice with this form of choice regarded as free, when the choice of the child cannot be understood as free? In some instances it might be the case that the right of the child to be cared for by its parents results in the parent specifically not uniting his action with the freedom of the child but instead restricting the freedom of the child (for example, think of a parent who prohibits the toddler from entering a lake). But then if the child does not stand in this reciprocal relation of choice to the adult, how can a child be understood to have rights at all?

It is precisely the paternalistic legal attitude towards children that makes it hard to see them as rights-bearers. This is because adults impose rights on children, leaving out completely the (potentially free) choice of the child. Children can in no way be understood to be the authors of their own laws (since they are not allowed to vote). In ‘Toward perpetual peace’, Kant defines external legal freedom as follows:

[I]t is the right through which I require not to obey any external laws except those to which I could have given my consent. In exactly the same way, external (legal) equality in a state is that relation of the subjects in consequence of which no individual can legally bind or oblige another to anything, without at the same time submitting himself to the law which ensures that he can, in his turn, be bound and obliged in like manner by this other.⁵³

It is clear we cannot understand children’s rights in the sense of the intersubjective, reciprocal granting and taking a certain right, in that the child is always legally bound by external laws to

⁵⁰ Kant I *Metaphysics of Morals* 6: 230.

⁵¹ Schapiro in her 1999 article notes on this topic that ‘Kant explicitly maintains not only that we can cultivate our natural and moral capacities but also that we have a duty to do so. However, he denies that we have a corresponding duty to cultivate perfection in others. [...] Now if children are simply adults in a less cultivated form, it would seem to follow that while children are indeed obligated to cultivate their own perfection, adults are not obligated to cultivate perfection in them’ (Schapiro T ‘What Is a Child?’ (1999) 109 *Ethics* 724). She takes this from Kant I *Metaphysics of Morals*, the *Doctrine of Virtue* (6: 386). However, it seems there is a distinction between cultivating perfection in others, which according to Kant is impossible, and cultivating ‘natural and moral capacities’. According to Kant, the latter can and must be done by parents. He states explicitly in the *Metaphysics of Morals*, ‘From this duty [of the parent to preserve and care for its offspring] there must necessarily also arise the right of parents to *manage* and develop the child, as long as he has not yet mastered the use of his members or of his understanding: the right not only to feed and care for him but to educate him, to develop him both *pragmatically*, so that in the future he can look after himself and make his way in life, and *morally*.’ Kant I *Metaphysics of Morals* 6: 281; emphasis in original.

⁵² Kant I *Metaphysics of Morals* 6: 280

⁵³ Kant I ‘Toward perpetual peace’ in Guyer P & Woods AW (eds) *Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant* (1996) 120 footnote (hereafter ‘Toward perpetual peace’).

which he cannot be understood to have given his consent. Children's rights are imposed forcibly. Even if this is done mindful of what adults regard as being in the best interest of the child, it cannot be called 'the interest of the child' since the child (particularly the young child) is not asked to express its interest⁵⁴ – and quite often it might be contrary to the direct interest of the child (do children really want the obligation to go to school?). In some cases it might even be that the paternalistic nature of this act of imposing rights actually causes resistance on the part of the child – especially in late childhood, when the child is in the process of developing his capacity for free choice but this capacity is not yet recognised by adults⁵⁵ (this is the essence of the parent-child battle of adolescence). Obviously, if children are understood, as Rousseau argues, as not yet participating in civil society, this raises all kinds of problems for the notion of children's rights. Because they are not yet part of civil society even though they find themselves in society, are they nevertheless part of the legal order? Can we understand children to have rights in this sense?

According to Lindahl (2013), an agent who, at a given point in time, actively endorses or owns the claims and attitudes he or she professed as an agent at an earlier point can be said to have 'self-identity'.⁵⁶ This is precisely what we *cannot* say of the child: since childhood is a period of development and change, the child's claims and attitudes change all the time. In this sense, the child can be said not to have a self-identity yet, and therefore an argument could be made that are not responsible for their past actions.

Lindahl applies this notion of self-identity at the collective level, arguing that 'integrated collectives display self-identity in the form of inter-temporal commitment'.⁵⁷ This is why a law created at point A in time still has validity at point B: the collective is capable of sticking to its commitment in the past, in that it understands 'us', as a collective, to be the same at point A as it was at B. This collective sameness manifests itself 'in the form of mutual normative expectations articulated and actualized in joint action under law'.⁵⁸ Again, because children lack this form of self-identity, in both the first-person singular and first-person plural, they cannot be understood to take part in a legal order, articulating mutual normative expectations.

Perhaps we are wrong in calling these agreements 'children's rights' and should rather call them 'children's legal privileges' – the legal privilege to go to school, the legal privilege to be supported by parents, the legal privilege to be protected by the government, the legal privilege of the child to receive a name and a nationality. Children are entitled to these not because of an

⁵⁴ Cf. Mayall B 'The sociology of childhood in relation to children's rights' (2001) 8 *The International Journal of Children's Rights* 243.

⁵⁵ The capacity of the child to make choices, albeit limited, is recognised in the CRC, where it is formalised in the right to participation. According to article 12.1, 'State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being due weight in accordance with the age and maturity of the child.' This principle is clearly in line with the Kantian idea of the child's developing freedom and related capacity to self-legislate. It is clear, too, that this capacity is necessarily limited, as it is the adult who decides whether the child 'is capable of forming his or her own views', and it is the adult who decides what (due) weight is given to these views.

⁵⁶ Lindahl H *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) Oxford University Press, discussing Ricoeur (1992) and Pettit (2001).

⁵⁷ Lindahl H *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 83.

⁵⁸ Lindahl H *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 84.

inherent freedom or a reciprocal relation of choice towards others; instead, autonomous adults, in exercising their free, practical will in an act of public will (which excludes children's will), choose to give these legal privileges to all children on an international legal level. Conversely, this agreement places a duty on parents, all adults and, ultimately, the government to guarantee these legal privileges. In addition, there are certain rights that children lack because they are children (that is, person who have not yet sufficiently realised their freedom), such as the right to vote and the right to choose to become a combatant.

4 Why children should have rights (or legal privileges)⁵⁹

As mentioned previously, there are two reasons for this act of public will, as described in the CRC: first, because the child, a mentally and physically immature being, needs special safeguards and care, and, secondly, because it contributes to freedom, justice and peace in the world.

I consider children's rights not as innate rights, since, as explained in section 3, children cannot be regarded as natural rights-bearers. Children's rights are instead social facts. We, adults, decide whether we want to grant children rights, in the same way we decide to form nations, governments and schools.⁶⁰ It is a joint action of 'we together', as adults. If we feel like it, we might decide to give children rights – or not. Why might we do this?

4.1 Essence of childhood: need for special safeguards and care

Tamara Schapiro maintains that

it is in virtue of children's undeveloped condition that we feel we have special obligations to them, obligations which are of a more paternalistic nature than are our obligations to adults. These special obligations to children include duties to protect, nurture, discipline, and educate them. They are paternalistic in nature because we feel bound to fulfil them regardless of whether the children in question consent to be protected, nurtured, disciplined and educated.⁶¹

She asks whether there can be a justification for this, specifically in the context of Kant's theory according to which 'each person is a sovereign authority whose consent is not to be bypassed'.⁶² Schapiro relates the becoming of the child to undeveloped (and therefore a lack of) agency, in comparison to the adult.⁶³

According to Kant, parents have a duty to care for their children until they are able to look after themselves, because by the act of procreation the parents have brought a person into the world without his or her consent.⁶⁴ While this may be true, children's legal rights go beyond parental

⁵⁹ Throughout this chapter, reference is made to children's rights rather than children's legal privileges, although, as has been argued, the latter would appear to be a more correct term.

⁶⁰ Cf. Darbyshire P et al. 'Multiple methods in qualitative research with children: more insight or just more?' (2005) 54 *Qualitative Research* 419.

⁶¹ Schapiro T 'What Is a Child?' (1999) 109 *Ethics* 716.

⁶² Schapiro T 'What Is a Child?' (1999) 109 *Ethics* 715.

⁶³ Schapiro T 'What Is a Child?' (1999) 109 *Ethics* 718.

⁶⁴ Kant I *Metaphysics of Morals* 6: 280.

obligation. As a community of free, autonomous beings, all members of that community, by means of granting children legal rights, including the right to care and protection, take on an obligation towards children – even those adults who are not parents and never will be. So, the reasons for these rights go beyond an initial responsibility for life.

According to the preamble of the CRC, the essential, universal character of childhood involves the fact that children are developing into adults. During childhood, they need care and protection because they are not yet able to survive without it. This is particularly true of the first stage of development. The child hence needs different forms of guidance, depending on the stage of development. As mentioned earlier, in a Kantian moral sense, childhood can be thought of as a pre-responsible period in which reason can gradually make itself acquainted with the moral law, cultivate virtue and practise value judgments based on the categorical imperative while being allowed to make mistakes.

As such, there is a need for (legal) protection – children cannot be held fully responsible for their immoral actions since these are not yet the consequence of free choice. Furthermore, children's legal privileges are necessary because the process of guidance, care and protection does not happen by itself; sometimes a child does not get the needed guidance, care and protection. As Freeman observes, 'Rights kick in when other values [...] fail. People are likely to claim their rights when their enjoyment of the objects of those rights is threatened.'⁶⁵ In other words, children need legal rights because their process of development is sometimes threatened by a lack of protection.

4.2 Incorporating children into the adult legal system

Nevertheless, we may still ask why we would want children to survive and to develop. From a legal perspective, we can grant that the latter is an existing norm which has been translated into law. The problem with all law relating to children is that, borrowing the terminology of Lindahl (2013), all action by children can be said in some sense to be a-legal. Lindahl gives an example of a shop, understood as an 'ought-place' where particular people ought (positively and negatively) to do particular things in a particular space at a particular time.⁶⁶ To qualify an act as illegal, one identifies an action as not legal in 'our legal order'. A-legality is then defined as 'behaviour that calls into question the distinction itself between legality and illegality as drawn by a legal order in a given situation'.⁶⁷

I would argue that every action by children, especially young children whose acts do not yet fall under criminal liability, are a-legal. With regard to the example of the shop as an ought-place, the child who sees some candy he or she likes might pick it up and start eating it in the shop, without being aware he or she is actually supposed to stand in a queue with the candy, pay for it and then eat it. Without being aware of the shop as an ought-place, the child's behaviour in this sense cannot be said to be illegal. One could argue that all actions by young children are necessarily legal, because of the lack of criminal liability. But then stealing is not

⁶⁵ Freeman M *Human Rights* (2002) 62.

⁶⁶ Lindahl H *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 18-22.

⁶⁷ Lindahl H *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 30-1.

quite legal as an act, not even if done by a child. In this act, the child is neither complying with a law or norm, nor violating it. Clearly, this qualifies as a-legality, as behaviour that calls into question the distinction between legality and illegality. In the same vein of thought, the child cannot question the behaviour of the other in relation to (il)legality. It has not yet mastered legal norms – or even norms in general. As Lindahl writes, ‘[E]ngaging in legal behaviour from the first-person singular perspective of a legal actor, i.e. an actor whose behaviour is legally coordinated with that of others, requires being able to take up the first-person plural perspective of a “we”’.⁶⁸ As has been argued by Rousseau, the child cannot take up this perspective of the first-person plural with regard to legality and morality. Therefore it cannot engage in legal behaviour; it cannot distinguish legal and illegal behaviour – it cannot even distinguish moral and immoral behaviour. Suppose a young child is sexually abused by a parent. The child does not understand this behaviour to be illegal or even immoral.⁶⁹ The child in this respect needs the adult, any adult, to point out that something is illegal and immoral. This is why they need legal privileges; they cannot be understood to be legal actors in a legal order.

Indeed, children’s actions and perspective constantly undermine the existing legal order by putting in question the boundaries between legal and illegal behaviour. Adults want to impose this order on children because it is their preferred and self-created order and they cannot allow their children to be (completely) excluded from it.⁷⁰ Since the child is in the process of development, during this period they need to learn how to fit into the legal order. All children’s rights that can be found in the CRC are involved in attaining this goal. The Convention states that ‘in all actions concerning children [...] the best interests of the child shall be a primary consideration’ (art. 3.1). But this is untrue; the interests of the child would be to eat the candy in the shop. It is in our best interest, as adults, to gradually integrate the child into our legal order.⁷¹ Perhaps in the end this can be argued to be in the best interest of the child too – because of his future situation of being an adult and having to conform to the existing legal and social order.⁷² But in that case the legal order is posited as an opposition to the individual particular will of this hypothetical future adult, and in that situation this adult cannot understand this legal order as his own, with him or her taking up the first-person plural perspective. In this sense the child, and possibly the future adult, are both unfree. As Van Roermund (2003) notes, ‘[W]hat constitutes freedom, first and foremost, is the possibility, for a people P, to act in pursuit of what it determines as its own interests, not the condition that the interests of its rulers are the same as the interests of its ruled subjects.’⁷³

⁶⁸ Lindahl H *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013) 81.

⁶⁹ Here the young child is used as an example to make the point particularly clear. However, it is less true for older children – during the period of childhood they start developing ideas about morality and legality, although as children they are not yet allowed to participate in the creation of the legal order.

⁷⁰ Cf. Jenks C *Childhood* (1996) 7-9.

⁷¹ Cf. Fortin, who argues that ‘many theorists see little need to rule out paternalistic interventions to restrict the actions of adults on children; indeed they consider them justified by reference to the rights of those constrained. On this basis, it is right to restrain or require activity simply because this will better promote that which the individual is interested in’ (Fortin J *Children’s Rights and the Developing Law* (2009) 22).

⁷² See, for example, Haugaard M ‘Power and social criticism: reflections on power, domination and legitimacy’ (2010) 11 *Critical Horizons* 51, 58.

⁷³ Van Roermund GCGJ ‘First-person plural legislature: political reflexivity and representation’ (2003) 6 3 *Philosophical Explorations* 237.

It seems that we think a legal order has to be imposed on a child so that he or she, as an adult, may adopt and internalise the first-person plural perspective in society and thereby fit into the social and legal order; in so doing, we even encourage the child, falsely, to understand him- or herself as the author of (the content of) that order and to understand the external legal order as something to which he or she could have consented. If so, then how is any legal actor ever truly free? And if, as Van Roermund writes in the same article, formulating the Reflexivity Thesis as an interpretation of Rousseau, ‘both the positivity and the validity of law lie with its legislators (the rulers) ruling over themselves’, how can we ever understand any law to be positive and valid, seeing that we all enter this order from childhood?⁷⁴

4.3 Towards a kingdom of ends

Kant’s notion of perpetual peace and a kingdom of ends might be the ultimate telos of children’s rights. In a way it is a reason stated in the CRC when it is argued that children’s rights ‘contribute to freedom, justice and peace in the world’. Kant describes the virtuous development of human beings as follows: first, human beings find themselves in a state of unsocial sociability where they are inclined to associate themselves with others and at the same time wish to isolate themselves.⁷⁵ This situation pushes human beings into the right moral direction (in terms of behaviour). They develop skills for acting morally, such as self-discipline; they learn to love to act morally and find they have a duty to familiarise themselves actively with the suffering of others elsewhere in the world and to extend their beneficence to them if necessary.⁷⁶ Eventually, the world in which all people act morally is a world in which all people are happy.⁷⁷ In his *Groundwork*, Kant describes this situation as a kingdom of ends, adding that this is only an ideal:

The concept of every rational being as one who must regard himself as making universal law by all the maxims of his will, and must seek to judge himself and his actions from this point of view, leads to a closely connected and very fruitful concept – namely, that of a kingdom of ends. I understand by a “kingdom” a systematic union of different rational beings under common laws. Now since laws determine ends as regards their universal validity, we shall be able – if we abstract from the personal differences between rational beings, and also from all the content of their private ends – to conceive a whole of all ends in systematic conjunction [...] Since these laws are directed precisely to the relation of such beings to one another as ends and means, this kingdom can be called a kingdom of ends (which is admittedly only an Ideal).⁷⁸

⁷⁴ This seems to come down to Rousseau’s famous paradox that, in political society, ‘man is born free, and everywhere he is in chains’ (*The Social Contract*).

⁷⁵ Kant I *Perpetual Peace* fourth thesis.

⁷⁶ Kleingeld P *Kant and Cosmopolitanism: The Philosophical Ideal of World Citizenship* (2011) 167-8.

⁷⁷ Kleingeld P *Kant and Cosmopolitanism: The Philosophical Ideal of World Citizenship* (2011) 162.

⁷⁸ I Kant *Groundwork* in Guyer P & Woods AW (eds) *Practical Philosophy: the Cambridge Edition of the Works of Immanuel Kant* (1996) 100-10.

So, for Kant, history is a process of moral progress.⁷⁹ I want to take this idea one step further and point out that in the kingdom of ends, because all human beings have developed their virtue to the fullest, gaining complete knowledge of the Good, there is no need for laws. The legal order ceases to exist because the 'ought' has become the immediate 'is'. Even if Kant is pessimistic about the possibility of the actualisation of such a kingdom of ends, it is necessarily something that we as human beings should strive for. It is what the 'ought' of the current law is directed at, a situation of ultimate justice. This is the answer to the question about the telos of practical reason, as concerns law. How we raise our children should be directed by these considerations. If we raise our children in the best manner possible – they are well-educated, are given the opportunity to practise moral reasoning, to apply the categorical imperative, to develop their level of thinking, to gain knowledge, to become aware of social relations and position themselves within the community – then the kingdom of ends may be only one generation away.

5 Conclusion

At first sight, it may seem that the point of this chapter is mainly a theoretical, philosophical one, given that it argues that when considering Kantian and Rousseauian notions of childhood, freedom, social relations and legal rights, we have to conclude that, within this framework, children cannot be said to have rights. However, there is a point to this chapter that goes beyond the philosophical and theoretical.

Finding that children's rights can be better understood as children's adult-initiated legal privileges seems to contradict most of the recent literature on children's rights, which often takes the view that the child is not only a becoming-adult but a person and social actor.⁸⁰ The finding, that is to say, seems fly in the face every child-liberationist, NGO worker, lawyer, and so on arguing for child participation. But this is not necessarily the case. To change the socio-legal position of the child, we first have to understand this position thoroughly, including its power relations. I fear that the recent emphasis on children's capabilities, however interesting and necessary, runs the risk of overlooking the existing power inequality between adult and child, especially when it comes to legal issues. As Smith argues, 'Discourses of childhood can be deployed in ways which simultaneously obscure and reinforce unequal relations of power such as those based on class, race or gender.'⁸¹ This is the risk, too, of regarding children's rights as innate rights.

In the discussion on children's rights, children are often grouped with women and other minority groups struggling for the recognition of their rights.⁸² It is tempting to see children as

⁷⁹ Kleingeld P *Kant and Cosmopolitanism: The Philosophical Ideal of World Citizenship* (2011) 173.

⁸⁰ See, for example, Alderson P *Young Children's Rights: Exploring Beliefs* (2005) 209; Christensen P & James A (eds) *Research with Children: Perspectives and Practices* (2008) 5; Mullender A et al. *Children's Perspectives on Domestic Violence* (2002) 3, and many others.

⁸¹ Smith K 'Introducing governable subjects: images of childhood old and new' (2012) 19 24 *Childhood* 35.

⁸² See, for example, Mayall B 'The sociology of childhood in relation to children's rights' (2001) 8 *The International Journal of Children's Rights* 243; Liebel M 'Paths to participatory autonomy: the meanings of work for children in Germany' 14 2 *Childhood* 260; Hendrik H 'The Child as a social actor in historical sources: problems of identification and interpretation' in Christensen P & James A (eds) *Research With Children: Perspectives and Practices* (2008) 40.

being equal in fact to adults but disempowered them, since most of us oppose the immorality of inequality. In regard, Alderson observes that

[c]hildren have more similarities with adults than differences from them [...] Changes in thinking and expression vary throughout life, especially in the early years, but these are perhaps better understood as changes of degree, rather than of kind. People come to think in more complicated ways, but not in entirely different ways. By five years, children have the kinds of intelligence – such as about self and others, language, science, technology and the arts – which last a lifetime.⁸³

In this chapter I have argued that there is in fact an essential difference between the child and the adult, which is reaffirmed by the CRC. As remarked by Rutter and Rutter, '[n]o amount of training will cause, say, a four-month-old to walk or talk, or a six-year-old to learn differential calculus'.⁸⁴ The crucial difference here between women's struggle for equal rights and the child's unequal relation to the adult is that women will never become men, whereas all children will become adults.⁸⁵

The current discussion on child liberationism, child participation and the like may obscure the reality that, as I have argued, ultimately the law is decided upon for children by adults: this is not a normative claim, simply a statement of fact about the contemporary world. And perhaps the situation is not necessarily a bad thing. When we recognise that 'children's rights' are not natural or God-given principles, that they are not based on a choice of the subject who possesses external legal freedom, but that 'children's rights' are adult-initiated social conventions, then – when this adult power has been made explicit – 'we' realise perhaps that we have an enormously powerful instrument in our hands. When we, as adults, agree to render children specific legal privileges, then it is our responsibility to guarantee the fulfilment of these legal privileges, as it is in our power to do so.

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⁸³ Alderson P *Young Children's Rights: Exploring Beliefs* (2005) 209.

⁸⁴ Rutter M & Rutter M (1993), as quoted by Fortin J *Children's Rights and the Developing Law* (2009) 72.

⁸⁵ See also Woodhouse, who argues that 'children are marginalized or even damaged by a system that claims to serve them but in which they are powerless and voiceless'. She argues that her proposed generist perspective 'would not simply substitute children for adults as autonomous rights-bearers in an adversarial system. The fact remains that most children's law involves adults acting on behalf of children. Children do not start out as autonomous beings; they grow into autonomy' (Woodhouse BB 'Hatching the egg: a child-centered perspective on parent's rights' (1993) 14 *Cardozo Law Review* 1756).

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